INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	4
Summary of argument	4
Argument:	
The refund was made when the payment was effected and not when the claim was allowed	7
Conclusion	38
Appendix A	39
Appendix B	45
Appendix C	49
Appendix D	51

CITATIONS

Cases:

Ada County v. *Gess*, 4 Idaho 611 — 36
Allegheny County v. *Grier*, 179 Pa. 639 — 36
Am. Security Co. v. *District of Columbia*, 224 U. S. 491 — 22
Amy v. *Dubuque*, 98 U. S. 470 — 15
Avery v. *Commissioner*, 292 U. S. 210 — 12
Beatty v. *Burnes*, 8 Cranch 98 — 16
Bismarck v. *Burleigh County*, 49 N. D. 205 — 36
Blair v. *Birkenstock*, 271 U. S. 348 — 32
Borer v. *Chapman*, 119 U. S. 587 — 14
Bowers v. *N. Y. & Albany Co.*, 273 U. S. 346 — 36
Champ Spring Co. v. *United States*, 47 F. (2d) 1, certiorari denied, 283 U. S. 852 — 34, 37
City of Biddeford v. *Benoit*, 128 Me. 240 — 36
City of Demopolis v. *Marengo County*, 195 Ala. 214 — 36
Clark v. *Iowa City*, 20 Wall. 583 — 15
Consolidated Paper Co. v. *United States*, 59 F. (2d) 281, certiorari denied, 288 U. S. 615 — 23
County of Cayuga v. *State*, 112 Misc. 517 — 36
County of Erie v. *Town of Tonawanda*, 95 Misc. 663 — 36
County of Wayne v. *Reynolds*, 126 Mich. 231 — 36
Daube v. *United States*, 289 U. S. 367 — 5, 13, 14, 17, 24, 29
Dupont de Nemours & Co. v. *Davis*, 264 U. S. 456 — 34
Eastman Kodak Co. v. *United States*, 13 F. Supp. 435 — 11
Ellis v. *Board of State Auditors*, 107 Mich. 528 — 36
Frederick v. *Douglas County*, 96 Wis. 411 — 36
Gilpatric v. *Hartford*, 98 Conn. 471 — 36

Cases—Continued. Page

Girard Trust Co. v. *United States*, 270 U. S. 163 ... 9, 12, 24, 26, 31
Granzow v. *Village of Lyons, Ill.*, 89 F. (2d) 83 ... 35
Heidt v. *United States*, 56 F. (2d) 559 ... 35
Helvering v. *Butterworth*, 290 U. S. 365 ... 3
Helvering v. *San Joaquin Co.*, 297 U. S. 496 ... 18
Independent Coal Co. v. *United States*, 274 U. S. 640 ... 34
Independent School Dist. No. 6 v. *Mittry*, 39 Idaho 282 ... 36
Kelley v. *United States*, 30 F. (2d) 193 ... 34, 37
Lamar Township v. *City of Lamar*, 261 Mo. 171 ... 22, 36
Lamar v. *United States*, 240 U. S. 60 ... 22
Lindley v. *United States*, 59 F. (2d) 336 ... 35
McEachern v. *Rose*, No. 6, present term, decided November 8, 1937 ... 28, 32
McElrath v. *United States*, 102 U. S. 426 ... 35
Ohio Oil Co. v. *United States*, decided June 18, 1936 ... 20
Pacific Coast Biscuit Co. v. *United States*, 19 F. Supp. 545, certiorari denied, October 18, 1937 ... 21, 50
Paulson v. *United States*, 78 F. (2d) 97 ... 7, 18, 29, 30
Pittsburgh Bridge & Iron Works v. *United States*, 40 F. (2d) 692 ... 23
Pottstown Co. v. *United States*, 282 U. S. 479 ... 27, 32
Rainey v. *Grace & Co.*, 231 U. S. 703 ... 28
Shepherd v. *Thompson*, 122 U. S. 231 ... 16
Smyth v. *United States*, 92 F. (2d) 900 ... 31
State ex rel. Barker v. *Scott*, 270 Mo. 146 ... 36
State ex rel. Buder v. *Hackmann*, 305 Mo. 342 ... 36
State v. *Young*, 134 Iowa, 505 ... 36
Steele v. *United States*, 113 U. S. 128 ... 35
St. Croix County v. *Webster*, 111 Wis. 270 ... 36
St. Louis Union Trust Co. v. *United States*, 82 F. (2d) 61 ... 35
Talcott v. *United States*, 23 F. (2d) 897, certiorari denied, 277 U. S. 604 ... 34, 37
Towne v. *Eisner*, 245 U. S. 418 ... 22
United States v. *Bartron*, 35 F. (2d) 765 ... 34, 37
United States v. *Boston Buick Co.*, 282 U. S. 476 ... 27, 32
United States v. *Burchard*, 125 U. S. 176 ... 35
United States v. *Claflin*, 97 U. S. 546 ... 28
United States v. *Dempsey*, 104 Fed. 197 ... 35
United States v. *Iron Cap Copper Co.*, 282 U. S. 476 ... 50
United States v. *Kirby Lumber Co.*, 284 U. S. 1 ... 18
United States v. *Lee Yen Tai*, 185 U. S. 213 ... 28
United States v. *Magnolia Co.*, 276 U. S. 160 ... 32
United States v. *Michel*, 282 U. S. 656 ... 36
United States Paper Exports Ass'n v. *Bowers*, 80 F. (2d) 82 ... 35, 37
United States v. *Pusey*, 47 F. (2d) 22 ... 35
United States v. *Stahl*, 151 U. S. 366 ... 35
United States v. *Standard Spring Mfg. Co.*, 23 F. (2d) 495 ... 34, 37
United States v. *Swift & Co.*, 282 U. S. 468 ... 6, 11, 17, 27, 28, 32
United States v. *The Reform*, 3 Wall. 617 ... 28

Cases—Continued. Page

United States v. *Tuthill Spring Co.*, 55 F. (2d) 415 35
United States v. *Updike*, 281 U. S. 489 36
United States v. *Whited & Wheless*, 246 U. S. 552 34
United States v. *Woolner Distilling Co.*, 52 F. (2d) 666, affirmed, 62 F. (2d) 228 35
Warner v. *Walsh*, 15 F. (2d) 367 3
Wisconsin Central R'd v. *United States*, 164 U. S. 190 ..... 35, 38
Wood v. *United States*, 16 Pet. 342 28

Statutes:

Act of October 6, 1917, c. 79, 40 Stat. 348, Sec. 1 10
Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 252, Sec. 1301 ..... 10, 15, 23
Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 252 15
Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 281 15
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 1116 ..... 30, 39
Act of February 28, 1927, c. 226, 44 Stat. 1250, 1254 21
Revenue Act of 1928, c. 852, 45 Stat. 791:
Sec. 322 ..... 22, 39
Sec. 608 (U. S. C., Title 26, Sec. 1674) 40
Sec. 610 (U. S. C., Title 26, Sec. 1646) 2, 28, 40
Sec. 614 (U. S. C., Title 26, Sec 1671) 10, 41
Sec. 710 (U. S. C., Title 26, Sec. 1677) 20, 41
Revenue Act of 1932, c. 209, 47 Stat. 169:
Sec. 322 42
Sec. 1104 (U. S. C., Title 26, Sec. 1670) 33, 43
Sec. 1106 (U. S. C., Title 26, Sec. 1433) 43
Revenue Act of 1934, c. 277, 48 Stat. 680:
Sec. 322 (U. S. C., Title 26, Sec. 322) 15
Sec. 502 (U. S. C., Title 26, Sec. 1646) 25, 43
Revenue Act of 1936, c. 690, 49 Stat. 1648:
Sec. 322 15
Sec. 803 (U. S. C., supp. II, Title 26, Sec. 1646) 25, 44
Revised Statutes Sec. 3220 (U. S. C., Title 26, Secs. 1670, 1676) 10

Miscellaneous:

Am. Law Institute, Restatement, Restitution, § 46 (a) 35
Commissioner's Schedule of Overassessment (Form 7920) 49
H. Rep. No. 179, 68th Cong., 1st Sess., p. 27 15
H. Rep. No. 2, 70th Cong., 1st Sess., pp. 33, 34, 35 ..... 19, 45
H. Rep No. 1492, 72d Cong., 1st Sess., p. 29 47
H. Rep. No. 704, 73d Cong., 2d Sess., p. 37 48
Paul and Mertens, Law of Federal Income Taxation:
Sec. 42.25 (vol. 5) 11, 51
Sec. 51.92, note 31b 18
S. Rep. No. 52, 69th Cong., 1st Sess., p. 38 45
S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41-43 46
S. Rep. No. 665, 72d Cong., 1st Sess., pp. 57, 58 ..... 12, 46
Webster's New International Dictionary (2d ed., unabridged) 18, 19

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 499

THE UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT K. WURTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 9–11) is not reported. The opinion of the Circuit Court of Appeals (R. 15–16) is reported in 91 F. (2d) 547.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 13, 1937 (R. 16). The petition for a writ of certiorari was filed on October 13, 1937, and was granted on November 15, 1937 (R. 17).

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under a statutory provision requiring the United States to bring suit for the recovery of an erroneous refund within "two years after the making of such refund," the limitation period commences to run from the date on which the Commissioner of Internal Revenue approves the schedule of overassessments, or from the date of payment to the taxpayer.

STATUTES INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.
>
> * * * * *
>
> (b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later.

Other pertinent statutes are set out in Appendix A, *infra*, pp. 39–44.

STATEMENT

The facts, as alleged in the Government's amended statement of claim (R. 4–6), and admitted by the taxpayer (R. 6), are as follows:

On or about March 15, 1930, the taxpayer filed an income tax return for the year 1929, reporting a net income of $94,065.14, and a tax of $17,195.14, which was duly paid (R. 5).

As the result of an audit of the taxpayer's return, the Commissioner of Internal Revenue erroneously determined that the taxpayer's reported net income was overstated in the amount of $21,835.87, representing the amount received by him as beneficiary of a trust created under the will of his wife [1] (R. 5).

Thereafter, an overassessment certificate, dated March 15, 1932, issued; and as a result of said overassessment, a certificate check dated April 30, 1932, in the amount of $4,513.37, was mailed to taxpayer (R. 5).

After demand, the taxpayer refused to repay the amount, and on April 26, 1934, this action was commenced (R. 1, 6).

On November 23, 1934, the taxpayer filed an affidavit of defense (R. 6), raising the question

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[1] The adjustment was based upon the decision of *Warner* v. *Walsh*, 15 F. (2d) 367 (C. C. A. 2d), which held that a surviving spouse who had decided to accept the net income of a testamentary trust in lieu of dower and/or statutory rights, had purchased an annuity and was not taxable until the capital had been recouped. After the refund was made in the case at bar upon the basis of that decision, this Court held otherwise in *Helvering* v. *Butterworth*, 290 U. S. 365, by deciding that a widow who had accepted the benefits of a will in lieu of her statutory rights had not purchased an annuity and that the currently distributable income of the testamentary trust was taxable to her as the beneficiary.

of law that the amended statement of claim showed on its face that suit was not brought before the expiration of two years after the making of the refund.

The District Court first ruled in favor of the Government (R. 6–8), but on reconsideration held for the taxpayer (R. 9–11). Final judgment accordingly was entered for the taxpayer (R. 12). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 15–16).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Government's action was not commenced within the time allowed by law.

2. In holding that in an action brought under Section 610 of the Revenue Act of 1928 for the recovery of moneys erroneously refunded to the taxpayer the limitation period commenced upon the signing of the certificate of overassessment.

3. In affirming the District Court's judgment sustaining the taxpayer's demurrer to the petition and in dismissing the case.

SUMMARY OF ARGUMENT

The Circuit Court of Appeals erred in holding that the "making" of a refund, which starts the two-year limitation period governing recovery of erroneous refunds (Section 610 (b) of the Revenue Act of 1928), occurs when the Commissioner first signs the schedule of overassessments, because

that is the "date of allowance of refund or credit" under Section 1109 of the Revenue Act of 1932. It has confused two entirely distinct statutory concepts: the provisions of Section 610 relating to the "making" of a refund were enacted for the first time in 1928; the "date of allowance" is a phrase which antedates the 1928 Act by many years. The "making" of a refund contemplates a completed transaction, whereas the "allowance" of a refund refers to a specific intradepartmental step that is revocable in nature. We submit that the "making" of the refund means payment, and that therefore the limitation period started running only upon payment.

Plainly, the Government's right of action cannot accrue until the refund has been paid to the taxpayer. And this Court and Congress have both recognized that a statute of limitations should not start running prior to the accrual of the cause of action. Moreover, the mere "allowance" may not result in a refund at all; the overassessment may be used up as an abatement or credit; or errors may be detected even subsequent to the drawing of the refund check which would prevent its delivery to the taxpayer. See *Daube* v. *United States*, 289 U. S. 367, 372.

The construction of the court below, by starting the running of the statute prior to the accrual of the cause of action, in effect penalizes the Government because of its careful and elaborate procedure

designed to insure the correct disbursement of public funds, and may even start the statute running before the error has occurred. The taxpayer is not entitled to "repose" prior to the date when he receives the refund check and the certificate of overassessment.

The court erred in using a section defining "allowance" of a refund to construe a section involving the "making" of a refund. The popular meaning of the words "making of such refund," taken together with their location in Section 610, discloses that they contemplate a completed payment. This is the meaning used in Section 710 of the Revenue Act of 1928, *infra*, p. 20, which provides that refunds in excess of $75,000 shall be reported to a joint committee of Congress before they are "made," and in the Committee Report proposing Section 614, in close sequence with Section 610. A different content for the word "made" is indicated in Section 322 (b) because of a strong policy against penalizing taxpayers, and holding refunds to them not timely, where the Commissioner has timely approved the overassessment and the delay in payment is due to administrative procedure and delays in Congressional appropriation over which the taxpayers have no control. The amendments to Section 610 confirm the conclusion that "making," as there used, means payment.

Section 1104 of the 1932 Act does not aid in the proper construction of Section 610 of the 1928 Act. It was designed to clarify the confusion as to the

meaning of "date of allowance" which attended a change in the Bureau practice preliminary to the consummation of a refund, and it was intended to affect only those problems which are resolved in terms of the date of "allowance." It is not *in pari materia* with Section 610, and should not be taken impliedly to modify that section of the earlier Act.

The Circuit Court of Appeals for the Tenth Circuit, the only other court which has passed on the question in this case, has accepted the view urged by the Government. *Paulson* v. *United States*, 78 F. (2d) 97.

The correct interpretation of Section 610 seems clear, but even if there were any doubts, they should be resolved in favor of the Government, since this is a statute of limitations barring a right of the Government. The action is not based upon a right granted by Section 610, but is an action for money had and received, i. e., for money which has been erroneously paid out of the public treasury. The canon that taxing statutes are to be construed liberally in favor of the taxpayer is inapplicable, since this suit was brought against respondent not as a taxpayer, but merely as one not entitled *ex aequo et bono* to retain Government funds erroneously paid out to him.

ARGUMENT

THE REFUND WAS MADE WHEN THE PAYMENT WAS EFFECTED AND NOT WHEN THE CLAIM WAS ALLOWED

The Circuit Court of Appeals held that the "making" of a refund, which starts the two-year

limitation period governing recovery of erroneous refunds (Section 610 (b) of the Revenue Act of 1928, *supra*, p. 2), occurs when the Commissioner first signs the schedule of overassessments. To reach that result it relied upon Section 1104 of the Revenue Act of 1932, *infra*, p. 43, which provides that the date on which the Commissioner first signed a schedule of overassessments, if after May 28, 1928, "shall be considered as the date of *allowance* of refund or credit." [Italics supplied.]

We submit that the decision is based upon a misconstruction of Section 610 of the Revenue Act of 1928, and upon a misapplication of Section 1104 of the Revenue Act of 1932. We contend that the limitation period prescribed by Section 610 started running only when the payment of the refund to the taxpayer was made.

A

A brief description of the practice of the Bureau of Internal Revenue in the consummation of a refund will supply background for the interpretation of these administrative sections.

In the first instance the Bureau prepares a certificate of overassessment for each taxpayer whose return discloses an overassessment. When the Commissioner accumulates a number of such certificates with respect to taxpayers in a single collection district, there is prepared a schedule of overassessments, one line on the schedule dealing with each taxpayer's account for the taxable year

in question. Along with the individual certificates of overassessment, this schedule is sent to the Collector, with directions to determine whether the overassessment is to be effected by means of an abatement of unpaid taxes for the year involved, or, if there is an overpayment, by means of a credit against taxes due and unpaid, or, in the absence of other taxes due, by means of a refund.

Formerly (before 1927), the Collector would not only check and make appropriate entries on the schedule of overassessments transmitted to him, but he would also execute a subsidiary schedule of refunds and credits, on which he would indicate whether he had entered a credit, and any amounts refundable. The Collector would return the two schedules and the certificates of overassessment; the schedule of refunds and credits would be checked by the Deputy Commissioner, then signed by the Commissioner and sent by him to the disbursing clerk of the Treasury to draw checks for the refunds shown on the schedule, the schedule containing a printed direction to that effect. See *Girard Trust Co.* v. *United States*, 270 U. S. 163, 164–166; *United States* v. *Swift & Co.*, 282 U. S. 468, 471–473.

Since January 1927, with the adoption of a new form for the schedule of overassessments,[2] the second schedule, namely, the schedule of refunds and credits, has been abandoned. See S. Rep. No. 665,

[2]Appendix C, *infra*, p. 49.

72d Cong., 1st Sess., p. 57, *infra*, p. 46. The Commissioner, who is the official "authorized * * * to remit, refund, and pay back all taxes erroneously or illegally assessed or collected,"[1] gives formal approval only to the schedule of overassessments. The Commissioner's "final action consists in signing the schedule of overassessments, which in itself contains complete directions as to the further steps to be taken toward abating, crediting, or refunding the overassessments entered on the schedule." *Ibid.* The Collector returns the certificates of overassessments with the schedule of overassessments on which are indicated the appropriate amounts of abatement, credit, and refund.

The Deputy Commissioner (who holds a distinct statutory office, Act of October 6, 1917, c. 79, 40 Stat. 348, Sec. 1; Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 1301 (a) (U. S. C., Title 26, Secs. 1715, 1716)) rechecks the amount of the refund, and computes interest on the overpayment (which runs to within thirty days of the date of the refund check, Section 614 (a) (2) of the 1928 Act). The schedule is then forwarded to the General Accounting Office for a pre-audit. If no reason for disallowing the refund, or off-setting it against another debt due the Government, is there discovered, the schedule is returned to the Bureau, where it is charged against the Congressional appropriation for the refund of taxes erroneously collected, and

[1] Revised Statutes, Section 3220.

then forwarded to the disbursing clerk of the Treasury Department who, following the Commissioner's directions contained in the schedule, draws a check for the amount of refund shown.[4] The checks, together with the certificates of overassessment, are then sent to the Collector for joint release to the taxpayer.

B

The limitation period of Section 610 of the 1928 Act does not start running until the refund has been paid to the taxpayer; until then the Government has no right of action.

Under the administrative practice as outlined, the refund is said to be "allowed" on the date when, in the ordinary course of events, the final decision and approval has been given by the Commissioner, the official authorized by statute to refund overpayments, see *supra*, p. 10. Under the former practice, the date of allowance was the one on which the Commissioner approved and signed the schedule of refunds and credits, see *United States* v. *Swift & Co.*, 282 U. S. 460, 474, 476. Under the new practice it is the date on which he signs the schedule of overassessments, according to the rule laid down in Section 1104 of the 1932

[4] This information has been obtained from officials of the Bureau of Internal Revenue. Much of it is indicated on the schedule of overassessments itself, see Appendix C, *infra*, p. 49. A further description of the practice is set out in Paul and Mertens, Law of Federal Income Taxation, § 42.25, reprinted *infra*, Appendix D, p. 51. See also *Eastman Kodak Co.* v. *United States*, 13 F. Supp. 435, 444 (C. Cls.).

Act, which was designed to enact the new practice into statute. See S. Rep. No. 665, 72d Cong., 1st Sess., pp. 57–58, *infra*, pp. 46–47.

But under both the old and the new practice, it is clear that the *allowance* is merely an administrative step or decision, and is not equivalent to the payment of the refund. See *Girard Trust Co.* v. *United States*, 270 U. S. 163, 169–170:

> Allowance in its ordinary sense does not mean payment, and in the practical administration of the Treasury Department the two things are quite different. The one is a decision by the competent authority that the payment should be made. The other is the actual payment. The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision finally, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section.

Compare *Avery* v. *Commissioner*, 292 U. S. 210, where it was held that a dividend constitutes taxable income to a stockholder in the year it is first made available to him and not at the time it was declared by the board of directors.[1]

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[1] It may be noted that the certificate of overassessment (Form 7776) which is delivered to the taxpayer along with the refund check contains the following:

"NOTE.—The interest, if any, included herein is taxable income, and must be included in your income tax return *for the year in which received.*" [Italics supplied.]

It is apparent that the "allowance" by the Commissioner may not result in a refund. In the first place, as of the date when the schedule of overassessments is signed by the Commissioner, it may be that the entire overassessment will be used up as an abatement; or it may be applied as a credit; or it may result in a refund. And even when the Collector fills in the amount of the refund, the Deputy Commissioner still has an opportunity to detect mistakes. Moreover, the transmission of a check by the Treasury to the Collector does not preclude the Commissioner from correcting any errors which may develop. In *Daube* v. *United States*, 289 U. S. 367, a schedule of refunds and credits had been signed by the Commissioner (under the old practice), and the refund check sent to the Collector for delivery to the taxpayer. The Collector, upon discovery of a mistake, returned the check, whereupon the Commissioner cancelled the allowance of the refund.

This Court said (p. 372):

> The transaction never went beyond the stage of intradepartmental conference and parley. The Commissioner had put his hand, it is true, to a schedule of refunds and credits, and had transmitted a check to one of his subordinates to be delivered to the claimant. By none of these acts had he so divested himself of control as to generate rights or interests in favor of the taxpayer if there was revocation or rescission in advance of notice or delivery. There had been

> messages back and forth between the officers and branches of an administrative bureau. There had been none to the outer world. The Commissioner, after signing the schedule, might scratch out his signature, and declare it inadvertent. Cf. *Ridgway* v. *United States, supra; Austin Co.* v. *Commissioner*, 35 F. (2d) 910. This in substance is what he did. After signing a check and mailing it to his agent, he might cancel the check while the agent still held it, and revoke the authority improvidently granted. The matter was still *in fieri*.

In view of the fact that an action brought under Section 610 of the 1928 Act is an action to recover money "which has been erroneously refunded" to the taxpayer,[6] it is clear that the Government has no right of action until the payment has been made. Until that moment, it always has the opportunity of correcting an error (*Daube* v. *United States, supra*), and perhaps of eliminating all possibility of a refund.

Respondent's construction, therefore, would start the limitation period running prior to the accrual of the Government's cause of action. It is highly improbable that Congress intended such a result. As this Court said in *Borer* v. *Chapman*, 119 U. S. 587, 602:

> It cannot be that the statute of limitations will be allowed to commence to run against a

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[6] Even prior to the enactment of Section 610, the Government could bring an action for money had and received. See *infra*, pp. 34–35.

> right until that right has accrued in a shape to be effectually enforced.

Compare *Clark* v. *Iowa City*, 20 Wall. 583, 589; *Amy* v. *Dubuque*, 98 U. S. 470, 474.

That this principle is also recognized by Congress is clear from the history of the provisions placing time limitations upon the filing of refund and credit claims. Under the earlier Acts the period began to run "from the date when the return was due." Section 252 of the 1918 Act, c. 18, 40 Stat. 1057; Section 252 of the 1921 Act, c. 136, 42 Stat. 227. In Section 281 of the Revenue Act of 1924, c. 234, 43 Stat. 253, it was provided that the period should start running from the time of payment of the tax, a provision which has been continued in the subsequent Acts.[1] In proposing the change, the Committee urged (H. Rep. No. 179, 68th Cong., 1st sess., p. 27):

> Logically the period of limitation should run from the date of payment, since it is at that time that the right accrues.

It cannot be considered that Congress intended to start the limitation period running prior to the accrual of the Government's cause of action, and

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[1] In Section 322 of the 1934 and 1936 Acts, Congress extended in part the basic limitation of two years from the payment of the tax by providing an alternative to the taxpayer of three years from the date when the return was due. The basic two-year period, as before, runs only from the date of payment; the alternative three-year period from the filing of the return is merely an additional margin of grace.

indeed at a time when it is uncertain whether a cause of action will ever accrue and in what amount. Such a construction would be tantamount to the imposition of a penalty upon the Government because of its careful and elaborate procedure designed to insure that it does not erroneously disburse the public funds to a person not entitled thereto, or to a person presently indebted to the United States.

Furthermore, *respondent's construction might start the statute of limitations running even before the error has occurred.* It is only *after* the Commissioner has signed the schedule of overassessments, and "allowed" the credits and refunds, that the Collector determines how much is to be abated, credited, and refunded. The mistake making the refund erroneous may occur at this step. Moreover, the error may occur even after this date, when the interest is computed by the Bureau before the schedule is sent to the disbursing clerk of the Treasury.

There is no apparent policy which would be served by respondent's construction. It is true that the statute of limitations should be viewed as a "statute of repose." See *Beatty* v. *Burnes,* 8 Cranch 98, 108; *Shepherd* v. *Thompson,* 122 U. S. 231, 235. But the taxpayer cannot argue that he should be accorded "repose" with respect to an erroneous refund even before he receives the money. In this connection, it is significant that even the fact that a refund has been allowed is "unknown

to the taxpayer" (see *Daube* v. *United States*, 289 U. S. 367, 373), until he receives, at the same time, the refund check and the certificate of overassessment. See Appendix D, *infra*, p. 51. To paraphrase the language in *United States* v. *Swift & Co.*, 282 U. S. 468, at 473, the first official notification which the taxpayer receives as to how his account has been handled with respect to abatement, credit, refund and interest is the certificate of overassessment which accompanies the check for payment, if any.

The contruction of the Circuit Court of Appeals gives rise to the anomaly of a statute of limitations running before the cause of action has accrued, and indeed possibly before the error has occurred; it causes hardship to the Government and penalizes it because of its careful checking procedure, without serving any real policy for the protection of taxpayers. Only plain language, which certainly is not present here, could justify such a result.

C

A consideration of the very words "making" and "allowance" supports the conclusion that they have entirely different meanings, and refer to different steps in the process of returning money paid by the taxpayer. In turning to a section defining "allowance" of a refund in order to construe another section involving the "making" of a refund, the court below seemed to consider the terms synonymous. The opinion below has been criticized on that

ground. Paul and Mertens, Law of Federal Income Taxation (1937 Cumulative Supp.), § 51.92, note 31b.[8]

1. In the absence of a contrary indication, it must be presumed that Congress used the phrase "making of such refund," in the generally accepted sense or popular meaning. See *United States* v. *Kirby Lumber Co.*, 284 U. S. 1, 3; *Helvering* v. *San Joaquin Co.*, 297 U. S. 496, 499; *Paulson* v. *United States*, 78 F. (2d) 97, 99 (C. C. A. 10th). If we look to the ordinary or popular usage of the words, as set forth in Webster's New International Dictionary (2d ed., unabridged), the decision of the court below is unsupportable.

A refund is there defined as "that which is refunded." The transitive verb "refund" is defined as follows: "2. To return (money) in restitution, repayment, * * *, etc.; as, to *refund* the price of a defective machine; to *refund* a hundred dollars excess on a tax. 3. To supply again with refunds; to reimburse." When the word is used in connection with "make," it is evident that Congress contemplated a completed result, for "make" means primarily to produce, form, bring about. This conclusion is reinforced by the surrounding language in Section 610 (b). Congress there

[8] There it is stated:

> * * * the *Wurts* case [seems] to consider "allowance" and "making" as synonymous. It would seem that the *Paulson* case [discussed *infra*, p. 29] is more nearly correct in holding that "making" means the actual payment date, something totally different from "allowance."

speaks of a portion of a tax "which has been erroneously refunded," and provides that suit must be begun within two years "after the making of *such* refund." Plainly, the statute deals with a consummated transaction.

Moreover, the same dictionary states that "*Make* followed by a noun with the indefinite article is often nearly equivalent to the intransitive verb corresponding to that noun; as '*make* a splash,' to splash, * * *." In other words, "to make a refund" means "to refund," in the intransitive sense. And the intransitive verb "refund" is explicitly defined: "To make repayment." Accordingly, whether this phrase was employed in the transitive or intransitive sense, Congress clearly contemplated a completed transaction.

2. With respect to other sections of the Revenue Act, Congress has clearly indicated its acceptance of the popular meaning of the words "made" and "making" (of a refund), as outlined above.

In Section 614 of the Revenue Act of 1928, *infra*, p. 41, in close sequence with Section 610, Congress provided that interest should run to a date preceding the date of the refund check by not more than thirty days. In so doing, it abandoned the former rule contained in Section 1116 of the 1926 Act that interest should run to the "date of the allowance." The Report of the House Committee explained the change as follows (H. Rep. No. 2, 70th Cong., 1st Sess., p. 35):

> The principal change made in existing law is that in the case of a refund the inter-

> est period now terminates with the *allowance* of the refund, a date which often *precedes* the actual *making* of the refund by a considerable period of time and thus deprives the taxpayer of interest during that period. Under the above provision of this bill, interest runs to a date not more than 30 days preceding the date of the refund check, such date to be determined by the Commissioner. This provision is administratively practicable and it will result in giving the taxpayer interest to within approximately 30 days of the *date of the refund*. [Italics supplied.]

The popular meaning of the word "made" was also used in Section 710 of the Revenue Act of 1928, *infra*, pp. 41–42. This section provides:

> No refund or credit of any income, war-profits, excess-profits, estate or gift tax, in excess of $75,000, shall be *made* after the enactment of this Act, until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Commissioner of Internal Revenue is submitted to the Joint Committee on Internal Revenue Taxation. * * * [Italics supplied.]

It is apparent that Congress was not attempting in Section 710, *supra*, to delay the date of the revocable) allowance by the Commissioner. Compare *Ohio Oil Co.* v. *United States* (N. D. Ohio), de-

cided June 18, 1936, not reported but found in 1936 C. C. H., Vol. 4, pp. 10115, 10123, 10124. Congress was concerned with delaying the date of the *payment* of the large refund until the Joint Committee had an opportunity to consider it. Indeed, the statute contemplates that the "decision of the Commissioner" shall be forwarded to the Committee, and thirty days allowed to elapse, before the refund "shall be made." We are informed that under the administrative practice with respect to Section 710, which has been approved by the Joint Committee, the report is made to the Joint Committee on the date on which the schedule of overassessments is signed by the Commissioner, so that during the thirty days' consideration by the Joint Committee the schedule goes through the usual administrative handling by the Collector.[9] Thus, as the word is used in Section 710, the refund is certainly not deemed to have been "made" when the schedule is signed.[10]

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[9] The administrative practice is indicated more completely in *Pacific Coast Biscuit Co.* v. *United States*, 19 F. Supp. 545, 552.

[10] The predecessor to Section 710 of the 1928 Act is contained in the Act of February 28, 1927, c. 226, 44 Stat. 1250, 1254, which even more clearly indicated that Congress employed the word "made" as synonymous with payment. There the deficiency appropriation measure with respect to the Bureau of Internal Revenue provides:

"*Provided*, That no part of this appropriation shall be available for *paying* any claim *allowed* in excess of $75,000 until after the expiration of sixty days from the date upon which a report giving the name of the person to whom the *refund is to be made*, the amount of the refund, and a sum-

3. In his brief in opposition to the petition for certiorari, respondent relies upon the provision in Section 322 (b) of the 1928 Act and the subsequent Acts that "No such credit or refund shall be allowed or made after two years from the time the tax was paid." But even assuming that Section 322 (b) preserves the rights of those taxpayers whose claims have been allowed within the two-year period, the construction of that section does not affect the proper interpretation of Section 610. The words "made" and "making," though normally used by Congress with the meaning accorded them by the lay mind and by the administrative officials, may be used in a different sense in a particular section, in the light of the context and the end in view. "The same words may have different meanings in different parts of the same statute," *Lamar* v. *United States,* 240 U. S. 60, 65; *Am. Security Co.* v. *District of Columbia,* 224 U. S. 491, 494. See *Towne* v. *Eisner,* 245 U. S. 418, 425, where this Court said that "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

In considering the meaning of the phrase "No such credit or refund shall be allowed or made," as used in Section 322 (b) and its statutory prede-

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mary of the facts and the decision of the Commissioner of Internal Revenue is submitted to the Joint Committee on Internal Revenue Taxation * * *." [Italics supplied.]

cessors,"[11] the words may have to be suited to the very strong policy against penalizing taxpayers because of fortuitous circumstances, arising after allowance of the refund by the Commissioner, over which they have no control.

It is not likely that Congress intended to deprive a taxpayer of a refund properly and timely allowed where, for example, it could not be paid out because of the delay of Congress in making appropriations therefor.[12] Furthermore, literal adher-

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[11] The phrase was originally inserted as a proviso to Section 252 of the Revenue Act of 1918, c. 18, 40 Stat. 1057.

[12] See, e. g., *Consolidated Paper Co.* v. *United States*, 59 F. (2d) 281, 286 (C. Cls.), certiorari denied, 288 U. S. 615: "Pursuant to the usual practice the schedule of refunds and credits which had been signed and approved by the Commissioner was, on November 13, 1926, forwarded to the General Accounting Office for check to ascertain whether or not the taxpayer was otherwise indebted to the United States. The funds under the appropriation for '1927 and prior years,' from which all refunds and interest were payable, had been temporarily exhausted November 4, 1926. The 'Schedule of refunds and credits' was therefore returned by the General Accounting Office to, and was retained by, the accounts and collection unit of the Bureau of Internal Revenue to be held until such time as funds should become available, *as on former occasions*. Funds from which the item of interest could be paid under the appropriation for '1928 and prior years' were in the hands of the disbursing clerk of the Treasury Department on March 3, 1927." [Italics supplied.]

See also *Pittsburgh Bridge & Iron Works* v. *United States*, 40 F. (2d) 692, 695 (W. D. Pa.):

"The Commissioner had performed every act for payment of interest due the plaintiff under the act of 1924, except the actual mailing of the check and certificate of overassessment. These acts would have been done prior to February 26, 1926, if there had been available funds in the treasury."

ence to the wording of Section 322 (b) would have prejudiced taxpayers whose claims ran into purely mechanical difficulties after the date on which the Commissioner listed them on the schedule of overassessments (which the Treasury regarded as the date of allowance until the decision in *Girard Trust Co.* v. *United States*, 270 U. S. 163, 170).

Indeed, this policy was recognized in the Committee Report proposing Section 1104 of the 1932 Act, *infra*, pp. 46–47, which reveals that Congress set the date of allowance at the date on which the Commissioner first signed the schedule in order to permit small taxpayers, unaware of their right to a refund, to take advantage of the fact that before the expiration of the statutory period for filing claims for refund, the Commissioner had signed a schedule. But the considerations which prompted Congress to save the rights of a taxpayer, entitled to a refund, from prejudice because of the complicated intradepartmental process by which a schedule is transmuted into the correct bookkeeping entry—abatement, credit, or refund—are far from suggesting that while this process is going on, and while the Commissioner might still "scratch out his signature, and declare it [the schedule] inadvertent" (*Daube* v. *United States*, *supra*, p. 372), the statute of limitations was intended to run against the United States on a suit which the Government can not yet institute against a taxpayer not rightfully entitled to the refund.

The meaning accorded the words in Section 322 (b) may reflect the strong policy to save the taxpayer from prejudice. However, in other sections, the end in view is best served by the natural meaning of the words. Thus, in Section 710 of the 1928 Act, *supra*, p. 20, Congress used the word "made" in its usual sense in order to express its purpose that the actual disbursement of public funds be delayed until its joint committee has had opportunity to examine the proposed action. And the natural meaning of the word "making" in Section 610 subserves the policy considerations underlying a statute of limitations.

4. Respondent has predicated an argument on the language used in amending Section 610 of the 1928 Act. The section has been amended twice. Section 502 of the Revenue Act of 1934, *infra*, p. 43, extends the limitation period to five years "from the making of the refund" where any part of the refund has been induced by fraud. Section 803 of the Revenue Act of 1936, *infra*, p. 44, provides that erroneous refunds shall bear interest from the date of payment of the refund. There is nothing in the latter amendment or its legislative history to support the taxpayer's contention that Congress used the phrase "payment of the refund" in a different sense from the phrase "making of such refund." Rather it seems that the slight variation in the language clarifies the situation and shows that with respect to this section Congress was concerned with the date on which the refund was actually

made, and not at all with the date of "allowance," however important that date might be in other types of cases. It seems reasonable to suppose that Congress intended both the statute of limitations and the Government's right to interest to start running on the same date.

D

Section 1104 of the 1932 Act does not affect in any way the proper construction of Section 610 of the 1928 Act. It merely defines the "date of allowance," to aid in the resolution of problems depending upon that date.

The Senate Committee Report on Section 1104, *infra*, p. 46, reveals that it was designed to clarify the confused situation with respect to the meaning of "date of allowance," arising from a change in Bureau practice.

Under earlier Bureau practice the Commissioner signed two schedules—first a schedule of overassessments which was forwarded to the Collector, and second, a schedule of refunds and credits, after the receipt of a report from the Collector. In cases in which it was important to ascertain the "date of allowance," this Court held that under that practice the date of the second schedule was to be taken as the "date of allowance." As will be shown below, pp. 31–32, it became important to determine the "date of allowance" because the statute provided for interest up to that date (*Girard Trust Co.* v. *United States, supra*), because the statute in force

on that date governed the amount of interest payable (*United States* v. *Boston Buick Co.*, 282 U. S. 476, 478; *Pottstown Co.* v. *United States*, 282 U. S. 479), and because the date of allowance of a credit determined the date of payment of the tax liability against which the credit was taken for purposes of measuring the limitation period with respect to claims for refund of that tax (*United States* v. *Swift & Co.*, 282 U. S. 468).

Under the new practice adopted in 1927, the Commissioner signed only the schedule of overassessments. In 1931, this Court decided the *Swift & Co.*, *Boston Buick Co.* and *Pottstown Co.* cases, *supra*, with respect to the former practice. The applicability of these decisions to the newer practice was not clear. Accordingly, in drafting the Revenue Act of 1932, Section 1104 was inserted in order to remove the uncertainty as to the "date of allowance" under the later practice. It did not in any way fix the date of "making" the refund, but merely accommodated itself to the new Bureau practice by defining the "date of allowance" for whatever purposes that phrase was significant.

The phrase was no longer significant for purposes of measuring the period during which interest accrues to the taxpayer, in view of the new provisions of Section 614 of the 1928 Act. But the phrase was still important, e. g., with respect to the limitation period under Section 322 (b) (2), and the Committee Reports disclose that that application was one of the factors which motivated the selection of the early date. And the phrase might still

be important for other purposes. See *United States* v. *Swift & Co.*, 282 U. S. 468; *McEachern* v. *Rose*, No. 6, present Term, decided November 8, 1937, *infra*, pp. 32–33; Section 1106 of the 1932 Act, *infra*, p. 43.

The foregoing shows that Section 1104 was meant to apply to, and to clarify, only those situations and sections hinging on the "date of allowance." It was not meant to modify Section 610 of the 1928 Act, which refers to the time of "making" of the refund. It is not *in pari materia* with Section 610. Moreover, it may be noted that on the two occasions when Congress desired to amend Section 610, it did so specifically. In construing different statutory provisions, implied amendments are not to be favored.[13]

E

The Circuit Court of Appeals for the Tenth Circuit, the only other court which has passed on the

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[13] This follows from the settled doctrine that repeals by implication are not favored, for a modification is a partial repeal. Even where there is a positive repugnancy between the provisions of two laws "the old law is repealed by implication, only *pro tanto*, to the extent of the repugnancy." *Wood* v. *United States*, 16 Pet. 342, 363; *United States* v. *Lee Yen Tai*, 185 U. S. 213, 221. The supposed repugnancy must be especially clear where the repeal would operate to the prejudice of the Government. *United States* v. *The Reform*, 3 Wall. 617, 633. Moreover, the presumption against implied repeal obtains even where the two laws are on the same subject (*United States* v. *Claflin*, 97 U. S. 546, 552; *Rainey* v. *Grace & Co.*, 231 U. S. 703, 709), but in this case the two statutes on their face deal with different concepts.

question at bar, has sustained the Government's position.

In *Paulson* v. *United States*, 78 F. (2d) 97, two suits were filed more than two years after the schedule of overassessments was approved; one was filed within two years of the issuance of the refund check; the other was filed more than two years after the mailing of the refund check but less than two years after the delivery thereof. The Circuit Court of Appeals held both suits timely (p. 99):

> * * * the refund is made when the money is paid. Refund means to pay back, return, restore, make restitution. That is the ordinary and popular concept of the word, and in the absence of a contrary indication, it must be presumed that the Congress used it in that generally accepted sense. The return, restoration, and restitution of the money is made when the check in payment of the obligation is delivered. Communication with the taxpayer absent, the preceding actions are exclusively intradepartmental or interdepartmental, and may be changed, corrected, revised, or rescinded, as circumstances require. The Commissioner may declare the schedule erroneous or inadvertent and erase his signature from it without violating any rights of the taxpayer. *Daube* v. *United States*, 289 U. S. 367, 53 S. Ct. 597, 77 L. Ed. 1261. Ordinarily a statute of limitation does not begin to run until a suit could be brought. Certainly it cannot be contended that a suit of this na-

> ture may be maintained and judgment secured after the schedule of refunds and credits has been approved, but before the money is paid to the taxpayer.

It is true that in the *Paulson* case, the schedules of overassessment were signed before May 28, 1928, and hence were not affected by Section 1104 of the Revenue Act of 1932, *infra*, p. 43. But it is manifest that Section 1104 would not have evoked a different decision. The court did not even comment on the definition of date of "allowance" of a refund contained in Section 1116 (b) (2) of the 1926 Act. Indeed, the court explicitly rejected the contention that the date of allowance is the date on which a refund is made within the meaning of Section 610 of the Revenue Act of 1928 (p. 99):

> * * * the statute does not provide that the suit shall be filed within two years after the refund is allowed.. On the contrary, it is provided textually that the period shall run from the time the refund is made. The distinction between the act of allowing a refund and that of refunding the money is manifest, and the supposed analogy between the two cited cases and these emphasizes the clear and decisive difference. Congress could have provided that suit must be filed within two years after the refund is allowed; but for reasons sufficient unto itself, it provided otherwise.

That the Circuit Court of Appeals for the Tenth Circuit has persisted in this view even as to sched-

ules signed after May 28, 1928, is indicated by *Smyth* v. *United States,* 92 F. (2d) 900. Although it appears from the record that that suit was filed within two years of the approval of the schedule of refunds, that fact is not disclosed by the opinion, and in the opinion, which treats of the effect of Section 610 of the Revenue Act of 1928, the court states simply that the amount of the overassessment was refunded on January 11, 1932, and that complaint was filed November 9, 1933. It is clearly the date of the actual payment by the Government which the court regards as significant.

This Court has not previously been presented with a question like the one at bar. In several cases it considered the former Bureau practice with respect to the granting of credits and refunds, but the decisions neither discussed nor were concerned with the date of the "making" of a refund. In each of the cases, the pivotal issue was the determination of the date of the "allowance" of a refund or credit, and that is the only date the Court considered. Thus, in *Girard Trust Co.* v. *United States,* 270 U. S. 163, the Court was concerned with the proper construction of Section 1324 (a) of the Revenue Act of 1921, which provided that "upon the allowance of a claim" for refund or credit interest should be paid "to the date of * * * allowance." It selected the date of the signing of

the second schedule (under the Bureau practice then in effect) as the "date of allowance." Subsequent cases ruled that the amount of interest was governed by the Act in force on the date of the "allowance" of the refund (*United States* v. *Magnolia Co.*, 276 U. S. 160; *Blair* v. *Birkenstock*, 271 U. S. 348), and it was in view of these cases, and the necessity of determining which Act governed the interest on certain credits, that the "date of the allowance of the credits * * * [became] important" in *United States* v. *Boston Buick Co.*, 282 U. S. 476, and *Pottstown Co.* v. *United States*, 282 U. S. 479. In *United States* v. *Swift & Co.*, 282 U. S. 468, the date of allowance of the credit had to be determined because the taxpayer could not obtain a refund of a 1917 overpayment unless he had filed his claim within four years from the time the tax was paid, and the 1917 tax had been paid by the crediting of a 1918 overpayment. Since the claim for refund of the 1917 overpayment was filed less than four years after the Commissioner had approved the schedule of refunds and credits directing that the 1918 overpayment be credited against the alleged 1917 liability, it was held that the 1917 refund claim was timely filed. The foregoing cases applied the rule that the date of allowance was the date on which the schedule of refunds and credits was signed. In *McEachern* v. *Rose*, No. 6, present Term, decided November 8, 1937, the Court also discussed the date of allowance of a credit, and

noted that the rule of the decisions discussed above was changed by Section 1104 of the 1932 Act.[14] In that case the Collector attempted to resist a suit for the recovery of overpayments for 1929 to 1931 because of an underpayment for 1928. Since the Commissioner had signed no schedule of overassessments directing any credit of the later overpayments against the earlier underpayment, and certainly had not signed one prior to the date when collection of the 1928 deficiency was barred, the credit had not been made against the 1928 tax liability before the collection of that tax was barred by limitations, and so the credit was void under Section 609 (a) of the 1928 Act.

Thus, in these cases, the Court was called upon to ascertain the date of "allowance." It nowhere indicated that the date of "allowance" was considered the same as the date of the "making" of the refund, a distinct statutory concept.

F

The limitation period is clearly intended to start with the date of payment. But even if there are any doubts as to the proper construction of the

[14] It is perhaps more accurate to say that the change was effected by the adoption of the new Bureau practice in 1927 eliminating the second schedule. Section 1104 of the 1932 Act merely took cognizance of that change and adapted those decisions to the new practice, specifying that the date of allowance is the date on which the Commissioner first signs the schedule of overassessments.

statute, they should be resolved in favor of the Government.

Section 610 is merely a statute of limitations sought to be applied to bar a right of the United States. The rule is clear that such statutes are strictly construed in favor of the United States. *Independent Coal Co.* v. *United States*, 274 U. S. 640, 650; *United States* v. *Whited & Wheless*, 246 U. S. 552. As this Court said in *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462: "Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government."

It cannot properly be contended that this rule of construction is inapplicable on the ground that the limitation period of Section 610 is a limitation or condition of a right created by the same section. This is an action for money had and received to recover funds erroneously paid out of the Treasury of the United States to the respondent. The right of the Government to recover such erroneous refunds is quasi-contractual in nature and exists independent of statute. That the 1928 Act is not the source of the right to maintain such a suit is apparent from the decisions recognizing the propriety of such proceedings instituted prior to 1928. *Talcott* v. *United States*, 23 F. (2d) 897 (C. C. A. 9th), certiorari denied, 277 U. S. 604; *United States* v. *Standard Spring Mfg. Co.*, 23 F. (2d) 495 (Minn.); *United States* v. *Barton*, 35 F. (2d) 765 (S. D.); *Kelley* v. *United States*, 30 F. (2d) 193, 194 (C. C. A. 9th); *Champ Spring Co.* v. *United States*, 47 F.

(2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852; *United States* v. *Woolner Distilling Co.*, 52 F. (2d) 666, 667, 668 (S. D. Ill.), affirmed, 62 F. (2d) 228 (C. C. A. 7th); *United States* v. *Pusey*, 47 F. (2d) 22 (C. C. A. 9th); *United States* v. *Tuthill Spring Co.*, 55 F. (2d) 415 (N. D. Ill.); *Lindley* v. *United States*, 59 F. (2d) 336 (C. C. A. 9th); *United States Paper Exports Ass'n* v. *Bowers*, 80 F. (2d) 82, 85 (C. C. A. 2d); *St. Louis Union Trust Co.* v. *United States*, 82 F. (2d) 61, 65–66 (C. C. A. 8th). These cases, recognizing the right of the Government to bring an action for the recovery of an erroneous refund of taxes, are merely examples of the familiar rule that the sovereign may recover sums paid out of the public treasury by mistake either of fact or of law. See *Heidt* v. *United States*, 56 F. (2d) 559 (C. C. A. 5th); *Granzow* v. *Village of Lyons, Ill.*, 89 F. (2d) 83 (C. C. A. 7th); *United States* v. *Dempsey*, 104 Fed. 197 (D. Mont.); Am. Law Institute, Restatement, Restitution, § 46 (a). And this Court has not infrequently adverted to "the principle that parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them." *Wisconsin Central R'd* v. *United States*, 164 U. S. 190, 212. Cf. *Steele* v. *United States*, 113 U. S. 128; *United States* v. *Burchard*, 125 U. S. 176; *McElrath* v. *United States*, 102 U. S. 426, 440–441; *United States* v. *Stahl*, 151 U. S. 366.[15] Clearly, therefore, Section 610 did not

[15] Other illustrations of the right of the sovereign to maintain an action for money had and received in similar situa-

create the right of action in the Government. It merely confined the previous right of the Government, which was not subject to any limitation of time. It is a statute of limitations, and must be strictly construed in favor of the Government. See *supra*, p. 34.

In the brief in opposition to the petition for certiorari, respondent adverts (p. 13) to "the rule which requires taxing acts, including provisions of limitations embodied therein, to be construed liberally in favor of the taxpayer" (*United States* v. *Updike*, 281 U. S. 489, 496). That rule is applicable in controversies between the Government and a private citizen who is being affected *as a taxpayer*. See *United States* v. *Michel*, 282 U. S. 656, 659. But the doctrine applies only to controversies between the Government and the taxpayer, *as such*, e. g., to controversies where the Government is trying to collect taxes, as in the *Updike* case and *Bow-*

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tions may be found in *City of Demopolis* v. *Marengo County*, 195 Ala. 214; *Gilpatric* v. *Hartford*, 98 Conn. 471; *Independent School Dist. No. 6* v. *Mittry*, 39 Idaho 282; *Ada County* v. *Gess*, 4 Idaho 611; *State* v. *Young*, 134 Iowa 505; *City of Biddeford* v. *Benoit*, 128 Me. 240; *Ellis* v. *Board of State Auditors*, 107 Mich. 528; *County of Wayne* v. *Reynolds*, 126 Mich. 231; *Lamar Township* v. *City of Lamar*, 261 Mo. 171; *State ex rel. Buder* v. *Hackmann*, 305 Mo. 342; *State ex rel. Barker* v. *Scott*, 270 Mo. 146; *County of Erie* v. *Town of Tonawanda*, 95 Misc. 663; *County of Cayuga* v. *State*, 112 Misc. 517; *Bismarck* v. *Burleigh County*, 49 N. D. 205; *Allegheny County* v. *Grier*, 179 Pa. 639; *Frederick* v. *Douglas County*, 96 Wis. 411; *St. Croix County* v. *Webster*, 111 Wis. 270.

ers v. *N. Y. & Albany Co.*, 273 U. S. 346. In the present case, although a tax situation gave rise to the controversy, the Government is not bringing suit against respondent as a taxpayer, but merely as someone to whom an erroneous payment was made. As was said in *Talcott* v. *United States*, 33 F. (2d) 897, 901:

> But here the counterclaim is not a proceeding for the collection of taxes. It is a demand for the repayment to the government of moneys which had been illegally and by mistake paid by an officer of the United States.

See also *United States* v. *Bartron*, 35 F. (2d) 765, 768 (S. D.); *Kelley* v. *United States*, 30 F. (2d) 193–194 (C. C. A. 9th); *Champ Spring Co.* v. *United States*, 47 F. (2d) 1, 2–3 (C. C. A. 8th), certiorari denied, 283 U. S. 852; *United States Paper Exports Ass'n* v. *Bowers*, 80 F. (2d) 82, 85 (C. C. A. 2d). Indeed in one case (*United States* v. *Standard Spring Mfg. Co.*, 23 F. (2d) 495 (D. Minn.), *supra*), after making the erroneous refund the Government sought to reassess and collect the tax *qua* tax, and after losing that suit it instituted a new proceeding to recover the erroneous refund. The defense of estoppel by judgment was rejected by the court, on the ground that the second suit was not for the recovery of a tax. The court said (pp. 496–497):

> The cause of action asserted by the government in the former suit against the defendant was for the recovery of a tax which it was asserted the defendant was liable to

> pay, but had not paid. The evidence showed that the tax had been paid, but had been erroneously refunded. It is apparent, therefore, that the government could not recover on the cause of action asserted, and its complaint was dismissed for that reason. It thereupon commenced this suit to recover the refund erroneously made. It is not estopped by the judgment in the former action.

Thus, since the Government is proceeding against respondent not as a taxpayer but as one who is "liable *ex aequo et bono* to refund" moneys illegally paid by a public officer, see *Wisconsin Central R'd Co.* v. *United States*, 164 U. S. 190, 212, the canon stated in the *Updike* case does not apply. The case is therefore one for the application of the general principle that statutes of limitations are to be construed strictly in favor of the United States.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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JANUARY 1938.

APPENDIX A

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1116. (a) Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, * * *

(b) As used in this section—

* * * * *

(2) The term "date of the allowance of the refund" means, in the case of any income, war-profits, or excess-profits tax, the first date on which the Commissioner signs the schedule of overassessments in respect thereof.

(c) This section shall be applicable to any refund paid, and to any credit taken, on or after the date of the enactment of this Act, even though such refund or credit was allowed prior to such date.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) *Limitation on allowance.*—

(1) PERIOD OF LIMITATION.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such

period a claim therefor is filed by the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND.—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

* * * * *

SEC. 608. EFFECTS OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, Sec. 1674.)

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional

amount, or addition to such tax), refund of which is erroneously made, within the meaning of section 608, after the enactment of this Act, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)

SEC. 614. INTEREST ON OVERPAYMENTS.

(a) Interest shall be allowed and paid upon any overpayment in respect of any internal-revenue tax, at the rate of 6 per centum per annum, as follows:

* * * * *

(2) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than 30 days, such date to be determined by the Commissioner.

* * * * *

(U. S. C., Title 26, Sec. 1671.)

SEC. 710. REFUNDS AND CREDITS TO BE REFERRED TO JOINT COMMITTEE.

No refund or credit of any income, war-profits, excess-profits, estate or gift tax, in excess of $75,000, shall be made after the enactment of this Act, until after the expiration of thirty days from the date upon which a report giving the name of the person to

whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Commissioner of Internal Revenue is submitted to the Joint Committee on Internal Revenue Taxation. A report to Congress shall be made annually by such committee of such refunds and credits, including the names of all persons and corporations to whom amounts are credited or payments are made, together with the amounts credited or paid to each. (U. S. C., Title 26, Sec. 1677.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) LIMITATION ON ALLOWANCE.—

(1) PERIOD OF LIMITATION.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND.—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

* * * * *

(d) OVERPAYMENT FOUND BY BOARD.—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the

amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax paid more than two years before the filing of the claim or the filing of the petition, whichever is earlier.

* * * * *

SEC. 1104. DATE OF ALLOWANCE OF REFUND OR CREDIT.

Where the Commissioner has (before or after the enactment of this Act) signed a schedule of overassessments in respect of any internal revenue tax imposed by this Act or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax. (U. S. C., Title 26, Sec. 1670.)

SEC. 1106. REFUNDS OF MISCELLANEOUS TAXES.

(a) Subsection (a) of section 3228 of the Revised Statutes, as amended, is amended by adding at the end thereof the following:

"The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund." (U. S. C., Title 26, Sec. 1433.)

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 502. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

(a) Section 610 of the Revenue Act of 1928 is amended by adding at the end thereof a new subsection to read as follows:

"(c) Despite the provisions of subsections (a) and (b) such suit may be brought at any time within five years from the making of the refund if it appears that any part of the refund was induced by fraud or the misrepresentation of a material fact." (U. S. C., Title 26, Sec. 1646.)

* * * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 803. INTEREST ON ERRONEOUS REFUNDS.

(a) Section 610 of the Revenue Act of 1928, as amended, is amended by adding at the end thereof a new subsection to read as follows:

"(d) Erroneous refunds recoverable by suit under this section shall bear interest at the rate of 6 per centum per annum from the date of the payment of the refund." (U. S. C., Sup. II, Title 26, Sec. 1646.)

APPENDIX B

Excerpts from Committee Reports:

S. Rep. No. 52, 69th Cong., 1st Sess., p. 38:

> SEC. 1116. * * * In the case of refunds, interest is allowed "to the date of the allowance of the refund." In practice, the commissioner first signs a schedule of overassessments, which is sent to the collector, in order to determine whether the overpayment should be credited or refunded. The committee amendment proposes to fix as the date on which a refund is allowed the date on which the commissioner signs the schedule of overassessments.

H. Rep. No. 2, 70th Cong., 1st Sess., pp. 33, 34, 35:

> SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATIONS AGAINST THE TAXPAYER.
>
> If a refund is made after the expiration of the period for filing claim (claim not having been filed within the period) or after the rejection, after the date of the enactment of this Act, of a claim filed within the proper period and if the period for filing suit has expired (no suit having been filed within the period), the refund thus made shall be considered as erroneous and is recoverable by the United States as provided in section 610.
>
> SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.
>
> This section relates to the recovery of erroneous refunds as defined in section 608 and also to refunds which are erroneous independently of section 608. The section provides that any erroneous refund, of either class, may be recovered by suit brought in

the name of the United States if such suit is begun within two years after the making of the refund.

SEC. 614. INTEREST ON OVERPAYMENTS.

The principal change made in existing law is that in the case of a refund the interest period now terminates with the allowance of the refund, a date which often precedes the actual making of the refund by a considerable period of time and thus deprives the taxpayer of interest during that period. Under the above provision of this bill, interest runs to a date not more than 30 days preceding the date of the refund check, such date to be determined by the Commissioner. This provision is administratively practicable and it will result in giving the taxpayer interest to within approximately 30 days of the date of the refund.

(S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41–43, is to the same effect.)

S. Rep. No. 665, 72d Cong., 1st Sess., pp. 57–58:

SEC. 1104. DATE OF ALLOWANCE OF REFUND OR CREDIT.

Under the practice once prevailing in the Bureau of Internal Revenue the commissioner first signed a schedule of overassessments, which fixed the amount of the taxpayer's overassessment, and later, after the collector had made appropriate adjustments to the taxpayer's account in accordance with this schedule, signed a schedule of refunds and credits, which formally approved the action so taken and directed the making of any money payments due the taxpayer. In recent years the schedule of refunds and credits has been abandoned; the commissioner's final action consists in signing the schedule of overassessments, which in itself

contains complete directions as to the further steps to be taken toward abating, crediting, or refunding the overassessments entered on the schedule. Some question has arisen as to whether certain court decisions, rendered upon the basis of the previous practice and holding that the allowance of the refund or credit takes place upon the signing of the second schedule, are applicable under the new practice. The provisions of this section, added by your committee, establish a rule which accords with the practice of the Treasury and permits the allowance of refunds and credits with the minimum of difficulty to the Government and the taxpayers as well. It protects the interests of the small taxpayers particularly, who may not learn of any refund or credit which may properly be due them in sufficient time to file a claim and may lose the benefit thereof unless the commissioner by signing the schedule of overassessments can make the allowance within the statutory period. In order to settle any question as to the commissioner's allowance of a number of small refunds and credits in cases recently arising, your committee has made the provisions of this section retroactive to the date of the enactment of the 1928 act.

SEC. 1106. REFUNDS OF MISCELLANEOUS TAXES.

This section amends section 3228 of the Revised Statutes so as to expressly prohibit refund of the portion of any taxes paid more than four years before the filing of the claim (or allowance of the refund, if no claim was filed).

H. Rep. No. 1492, 72d Cong., 1st Sess., p. 29:

Amendment No. 261: Under this amendment a refund of miscellaneous taxes can

not exceed the amount of the tax paid during the four years immediately preceding the filing of the claim, or, if no claim is filed, then during the four years immediately preceding the allowance of the refund. The amendment provides that it shall not bar from allowance a claim for refund filed prior to the enactment of the bill if such claim would have been allowable had the amendment not been enacted. The House recedes.

H. Rep. No. 704, 73d Cong., 2d Sess., p. 37:

SEC. 502. Recovery of amounts erroneously refunded: This section amends section 610 of the Revenue Act of 1928 so as to give the United States 5 years to bring suit to recover amounts of internal revenue taxes erroneously refunded where any part of the refund was induced by fraud or misrepresentation of the material fact. In all other cases the period is 2 years which is the period provided by existing law without regard to the circumstances under which the refund was made.

APPENDIX C

Authorization of Commissioner appearing on Schedule of Overassessments (Form 7920):

This schedule must be adjusted and all required steps taken IMMEDIATELY.

The amounts listed in column 3 as overassessments (or reductions of tax liability) are hereby approved and allowed in the respective amounts indicated, if any.

The COLLECTOR will immediately check such items against the accounts of the taxpayers and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated in whole or in part and make such abatements as may be warranted by the condition of the taxpayer's accounts for the years involved. If any part of any such item is found to be an overpayment, the Collector will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against income, war profits, or excess profits taxes due, if any, making the appropriate entries in his accounts. The amounts credited will be entered by the Collector in column 6. The balance, if any, of the overpayment refundable will be entered in column 7 and an appropriate MEMORANDUM made upon the taxpayer's account showing the refund and the amount refunded. The Collector will thereupon complete and certify this schedule and return the same, with the necessary copies, to the Commissioner of Internal Revenue.

The DEPUTY COMMISSIONER of Internal Revenue will compute the interest payable, list the same in column 8, and enter the respective total amounts payable in column 9 or 10, or both.

The DISBURSING CLERK, Treasury Department, is authorized to pay the amount specified in column 9 or 10, or both.

Date ----------

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Commissioner of Internal Revenue.

The foregoing is set out in full in the sixth finding of fact in *Pacific Coast Biscuit Co.* v. *United States,* 19 F. Supp. 545, 551 (C. Cls.), certiorari denied Oct. 18, 1937, No. 348, present term.

The record in *United States* v. *Iron Cap Copper Co.* (282 U. S. 476, No. 43, Oct. Term, 1930, pp. 26–28), discloses that Form 7920 has been in use since January 1927 and sets out the entire schedule of overassessments containing, in addition to the above, the certificate of the Deputy Commissioner (made prior to the Commissioner's signing of the schedule) recommending the amounts for allowance, and the certificate of the Collector (made subsequent to the Commissioner's signature) that proper amounts have been abated and credited.

APPENDIX D

Paul and Mertens, Law of Federal Income Taxation, Vol. 5:

SEC. 42.25. *Procedure in the Case of Overassessments.*—Where the Commissioner determines that the amount of the tax assessed against a taxpayer for a particular taxable period is in excess of the correct tax due, a certificate of overassessment is prepared and entered on a schedule of overassessments which contains the letters "IT" indicating that it is an income tax schedule of overassessments, followed by the number of the schedule. This schedule is signed by the Commissioner and forwarded to the Collector. Upon receipt in the Collector's office, the overassessment is checked against the Collector's records of assessments against the taxpayer for the year involved.

If there is any assessment for such year which has not been paid, the amount of the overassessment, or a portion thereof equal to the unpaid amount, is abated. The abatement consists merely of entering the amount in the credit column of the particular assessment list opposite the taxpayer's name with an explanation of the fact that it is an abatement and a reference to the schedule number in the remarks column.

If there still remains a portion of the overassessment after abating all unpaid assessments for the particular year, the Collector will then check his records, using the alphabetical control cards, made up as explained

above, to ascertain whether there are any unpaid assessments against the taxpayer for other years. If so, the overassessment is applied against such unpaid assessments for the other year or years. This is, of course, a credit and the appropriate explanation is made in the remarks column of the assessment list.

If the amount of the overassessment is in excess of any and all unpaid assessments, the amount of the excess is certified by the Collector as a refundable overpayment. When the action by the Collector is thus completed the certificates of overassessment and the schedules are returned to the Bureau. Upon receipt in the Bureau of the certificates of overassessment and the schedules showing the action by the Collector, the Clearing Division of the Income Tax Unit at Washington makes a computation of interest, if any, to be allowed on any overpayment.

After the interest has been computed, the schedule, and certain other related documents, are forwarded to the General Accounting Office for a pre-audit review. If the General Accounting Office discovers no reason for disallowing the refund, the schedule and related documents are referred back to the Income Tax Unit, after which they are sent to the Accounts and Collections Unit of the Bureau of Internal Revenue to be charged against the congressional appropriation provided for the refunding of taxes erroneously collected. After it has been charged against the proper appropriation, a check is drawn by the Chief Disbursing Officer in favor of the taxpayer, and is forwarded to the Collector along with the certificate of overas-

sessment. The Collector's office then makes another examination to ascertain whether there are any unpaid taxes due from the same taxpayer, and requires a statement from the payee as to his tax liability to the Government. If no Federal taxes are found to be due and payable, the check is then forwarded to the taxpayer together with the certificate of overassessment.

The Collector's monthly statements are, of course, kept up to date by appropriate postings to reflect all abatements, credits and refunds.

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